



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 6, 1997

Mr. Randall C. Stump
Stump, Stump & Stump
P.O. Box 286
Georgetown, Texas 78627

OR97-0269

Dear Mr. Stump:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 103498.

The City of Bartlett (the "city") received a request for information relating to Officer Doug Holt's suspension and for the city's policy regarding suspension of employees. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.105, 552.107(1), 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You state that the city does not have a written suspension policy. Chapter 552 of the Government Code applies only to information in existence and does not require a governmental body to prepare new information. Open Records Decision Nos. 605 (1992), 572 (1990), 430 (1985). Therefore, the city need not respond to this part of the request.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The city must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that the documents responsive to the request are "primarily what is in the files of the City Attorney or other legal counsel for the City." In Open Records Decision No. 647 (1996), this office concluded that a governmental body may withhold information under section 552.103 or section 552.111 of the Government Code if the governmental body can show (1) that the information was created for trial or in anticipation of litigation under the test articulated in *National Tank v. Brotherton*, 851 S.W.2d 193 (Tex. 1993), or after a lawsuit is filed, and (2) that work product consists of or tends to reveal an attorney's "mental processes, conclusions, and legal theories." Open Records Decision No. 647 (1996) at 5 citing *United States v. Nobles*, 422 U.S. 225, 236 (1975)). We enclose a copy of Open Records Decision No. 647 (1996) for your information. In *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994), the Texas Supreme Court held that a request for a district attorney's "entire file" was "too broad" and that, citing *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993), "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Curry*, 873 S.W.2d at 380.

We must first determine whether the records were created for trial or in anticipation of litigation. Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it--unless, in other words, we have concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982). This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, and when a requestor hires an attorney who threatens to sue a governmental entity. Open Records Decision Nos. 555 (1990), 551 (1990). We conclude that the city has established that litigation was reasonably anticipated at the time the documents were created.¹ See Open Records Decision Nos. 386 (1983), 336 (1982), 281 (1981). Therefore, to the extent that the request encompasses the attorney's entire litigation file in connection with these two matters, the city may withhold the attorney's entire litigation file in these two matters under the work product doctrine as incorporated by section 552.103(a) of the Government Code.

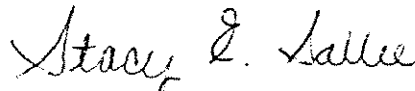
To the extent that the documents submitted to this office for review do not comprise the attorney's litigation file, we conclude that they are related to the pending litigation and, therefore, may be withheld under section 552.103(a). We note that when the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). This would include agendas of public meetings, correspondence with opposing counsel

¹We note that the city provided us with a copy of a petition that was filed against the city and others after the city received this request for information.

and pleadings that have been filed with the court.² In addition, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/ch

Ref.: ID# 103498

Enclosures: Submitted documents
Open Records Decision No. 647 (1996)

cc: Ms. Lana Hill
Box 95
Bartlett, Texas 76511
(w/Open Records Decision No. 647 (1996); w/o submitted documents)

²Additionally, the first page offense report information in Exhibit "I" and the document submitted as Exhibit "J" may not be withheld under section 552.103(a). See *Houston Chronicle Publ'g Co. v. City of Houston*, 508 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976). Further, none of the other claimed exceptions to disclosure would apply to any of the documents not excepted from disclosure under section 552.103(a).